

Fordham Law Review

Volume 83 *Volume 83*
Issue 3 *Volume 83, Issue 3*

Article 4

2014

The Court As Gatekeeper: Preventing Unreliable Pretrial eDiscovery from Jeopardizing a Reliable Fact-Finding Process

Daniel K. Gelb
Gelb & Gelb LLP

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Evidence Commons](#)

Recommended Citation

Daniel K. Gelb, *The Court As Gatekeeper: Preventing Unreliable Pretrial eDiscovery from Jeopardizing a Reliable Fact-Finding Process*, 83 Fordham L. Rev. 1287 (2014).
Available at: <https://ir.lawnet.fordham.edu/flr/vol83/iss3/4>

This Lecture is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE COURT AS GATEKEEPER: PREVENTING UNRELIABLE PRETRIAL EDISCOVERY FROM JEOPARDIZING A RELIABLE FACT-FINDING PROCESS

Daniel K. Gelb*

INTRODUCTION

Over the past several years, a significant legal debate has evolved over whether the predicates outlined in Federal Rule of Evidence 702 and interpreted by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹ should be applied to adjudicating issues relating to technology-assisted review (TAR).² The proliferation of electronic evidence and discovery (eDiscovery)—and the massive volumes of electronically stored information (ESI) associated with eDiscovery—require that practitioners understand how the pretrial review of ESI impacts its admissibility at trial.

As discussed more fully below, until a procedural scheme is codified by statute for the application of TAR and other related methodologies to

* Daniel K. Gelb is a partner at the law firm of Gelb & Gelb LLP in Boston, Massachusetts (www.gelbgelb.com) where he represents clients in general and white collar criminal defense matters, complex civil litigation, arbitration, regulatory proceedings, and academic disciplinary hearings. Prior to joining Gelb & Gelb LLP, Mr. Gelb was an Assistant District Attorney with the Norfolk County District Attorney's Office in Massachusetts. He is rated "AV" by *Martindale Hubbell Law Directory* and is listed in *New England Super Lawyers* and *Massachusetts Super Lawyers*. Mr. Gelb has been elected to be a fellow of the *Litigation Counsel of America* and as a member of *The National Trial Lawyers: Top 100 Trial Lawyers*. He is a frequent speaker and author on criminal and civil trial practice and procedure, including electronic evidence and discovery. Mr. Gelb is a contributing author of MCLE, Inc.'s *Ethical Lawyering in Massachusetts, Massachusetts Superior Court Civil Practice Manual*, and has been published by various media outlets including Bloomberg BNA, *Corporate Counsel Magazine*, *The Champion Magazine*, ABA's *Criminal Justice Magazine*, and *The New York Times* in the "Room for Debate" section of the newspaper's website. Mr. Gelb is a member of The Sedona Conference® Working Group on Electronic Document Retention & Production, the Advisory Board for Bloomberg BNA's *White Collar Crime Report*, and is a member of the National Association of Criminal Defense Lawyers' ("NACDL") *White Collar Crime Committee*, as well as NACDL's *Amicus Committee* for which Mr. Gelb is the Vice Chair for the First Circuit.

1. 509 U.S. 579 (1993).

2. See David J. Waxse & Brenda Yoakum-Kriz, *Experts on Computer-Assisted Review: Why Federal Rule of Evidence 702 Should Apply to Their Use*, 52 WASHBURN L.J. 207 (2013); see also Andrew Peck, *Search, Forward: Will Manual Document Review and Keyword Searches Be Replaced by Computer-Assisted Coding?*, L. TECH. NEWS (Oct. 2011), available at http://isites.harvard.edu/fs/docs/icb.topic1451491.files/Panel_1-Background_Paper.pdf.

eDiscovery review, litigants in both civil and criminal proceedings should be entitled to challenge whether an opponent has met the qualifying threshold of Rule 702. The integrity of the methodology for ESI review during the discovery phase will unquestionably impact the admissibility of the substantive evidence at trial. Therefore, the need for—and timing of—a Rule 702-type analysis for eDiscovery review must be reconciled with the current scheme to ensure judicial economy and procedural due process at trial for both civil and criminal litigants.

I. HISTORICAL OVERVIEW OF RULE 702 AND ITS APPLICATION

Originally, Rule 702 was intended to address the admissibility of expert *trial* testimony.³ The evolution of ESI, however, has created an inextricable tie between the evidence developed during the *discovery phase* of litigation and the admissibility of that evidence at the trial phase of the case.⁴ Notably, *Daubert*'s applicability to Rule 702 is not procedurally ripe at the eDiscovery review phase of litigation because, unlike at trial, the fact-finder during discovery has yet to be presented with an evidentiary question upon which to make a finding with the assistance of expert testimony.⁵

The Preliminary Draft of Rule 702 surfaced in 1969.⁶ The statutory history of Rule 702 is not controversial and, with the exception of the added terminology “in the form of an opinion or otherwise,” the text of the Preliminary Draft mirrors the ultimately codified content.⁷ When analyzing the promulgation of Rule 702, the Advisory Committee on Evidence Rules noted that “[w]hether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier [of fact].”⁸

In 1991, an amendment was proposed by the Advisory Committee on Civil Rules, the “avowed purposes” of which were to “limit the admissibility of scientific evidence and to coordinate the rule concerning admissibility of such evidence with the rules concerning its discovery.”⁹ Soon thereafter, in 1992, the Advisory Committee on Civil Rules referred

3. See, e.g., *United States v. Scavo*, 593 F.2d 837, 844 (8th Cir. 1979) (“One purpose of the Federal Rules of Evidence was to make opinion evidence admissible if it would be of assistance to the trier of fact.”).

4. See *Symposium on the Challenges of Electronic Evidence*, 83 FORDHAM L. REV. 1163, 1236 (2014).

5. See *Moore v. Publicis Groupe*, 287 F.R.D. 182, 188–89 (S.D.N.Y. 2012), *adopted sub nom.* *Moore v. Publicis Groupe SA*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).

6. See 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, *FEDERAL PRACTICE AND PROCEDURE* § 6261, at 170 & nn.1–2 (1997) (citing Preliminary Draft of Proposed Rules of Evidence for the U.S. District Courts and Magistrates, 46 F.R.D. 161, 314 (1969)). Wright and Gold describe how the Advisory Committee's Note to Rule 7-02 in the Preliminary Draft differed in two ways from the Advisory Committee's Note that presently follows Rule 702. First, the last paragraph of the Advisory Committee's Note to the 1972 Proposed Rules, beginning with “[t]he rule is broadly phrased,” was not part of the Preliminary Draft. *Id.* § 6261, at 170 n.1. Second, the Advisory Committee's Note in the Preliminary Draft included a paragraph that was ultimately excluded from the text of the Note. *Id.*

7. See *id.*

8. FED. R. EVID. 702 advisory committee's note.

9. 29 WRIGHT & GOLD, *supra* note 6, § 6261, at 171.

its proposed amendment to Rule 702 to the then-new Advisory Committee on Evidence Rules.¹⁰ In 1993, the Advisory Committee's task of reviewing the Civil Rules Committee's proposed amendment to Rule 702 was "preempted by the Supreme Court" in *Daubert*.¹¹

The advent of the Supreme Court's analysis in *Daubert* provided trial courts across the country with a framework on how Rule 702 limits the admissibility of scientific evidence. Thereafter, the Advisory Committee on Evidence Rules did not provide public notice of subsequent activity surrounding the 1992 proposed amendment.¹²

In 2011, the language of Rule 702 was amended "as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules."¹³ The changes were intended to be "stylistic only" without altering "any result in any ruling on evidence admissibility."¹⁴

Historically, expert witness testimony has been a facet of trial practice relegated to informing the fact-finder.¹⁵ In *Daubert*, the Supreme Court ultimately decided to grant certiorari "in light of sharp divisions among the courts regarding the proper standard for the admission of expert testimony."¹⁶ According to Chief Justice William Rehnquist, the petition for certiorari presented two questions: first, whether the rule of *Frye v. United States*¹⁷ should remain "good law after the enactment of the Federal Rules of Evidence," and second, if *Frye* remained good law, whether "expert scientific testimony" must be subject to a "peer review process" to be admissible.¹⁸

10. See *id.* § 6261, at 173 n.10 (citing Supreme Court of the U.S., Amendments to Federal Rules of Evidence, Excerpt from the Report of the Judicial Conf. Comm. on Rules of Practice and Procedure, 147 F.R.D. 275, 282 (1993)).

11. See *id.* § 6261, at 173.

12. See *id.* Wright and Gold note that a proposal to amend Rule 702 was introduced in Congress in 1995. *Id.* § 6261, at 173 n.13 (citing Attorney Accountability Act of 1995, H.R. 988, 104th Cong. § 3).

13. FED. R. EVID. 702 advisory committee's note.

14. *Id.*

15. In its note to the 1972 Proposed Rules considering the promulgation of Rule 702, the Advisory Committee quoted Mason Ladd:

There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

Id. (quoting Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952)).

16. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585 (1993). To demonstrate the split among circuits over the evidentiary standards concerning expert witness testimony, the *Daubert* Court compared *United States v. Shorter*, 809 F.2d 54, 59–60 (D.C. Cir. 1987), which applied the "general acceptance" standard, and *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 955 (3d Cir. 1990), which rejected the "general acceptance" standard. See *Daubert*, 509 U.S. at 585.

17. 293 F. 1013 (D.C. Cir. 1923).

18. *Daubert*, 509 U.S. at 598 (Rehnquist, C.J., concurring in part and dissenting in part).

Computer-assisted review is inherently based on various scientific disciplines, including statistical analysis.¹⁹ Since the Supreme Court has positioned the trial judge as the “gatekeeper” of expert testimony,²⁰ courts have the authority to determine whether expert testimony is truly based on “scientific knowledge,”²¹ which, in conjunction with Rule 702’s other factors, ultimately determines the admissibility of the testimony. It would seem logical to employ a Rule 702-type approach to TAR and other aspects of ESI review where the validation of the results may become of consequence to the fact-finder (e.g., pattern of conduct, intentional practices, motive, etc.).

As technology continues to weave itself into most—if not all—complex litigation, many evidentiary rulings are likely to be impacted by the underlying integrity of the discovery methodologies employed by the parties *before trial*. The complex nature of big-data litigation may arguably influence a trial court’s decision making vis-à-vis pretrial discovery; however, Supreme Court precedent on the standard of review has not changed.²² That being said, if *Daubert* and Rule 702 are relegated to the fact-finding process and held inapplicable to the reliability of discovery methods, what procedural tool can litigants assert when the standard of review places deference on evidentiary rulings made by the trial court?

The gatekeeping function under *Daubert* is particularly pertinent to the issue of whether Rule 702 should apply to litigating the application of TAR methodologies, such as predictive coding, to complex eDiscovery.²³ Expert testimony is *not a jury question* and is subject to Federal Rule of Evidence 104(a); that is, a court must rule on any preliminary question of qualification, privilege, or admissibility—on making such determinations, rules of evidence only apply to questions of privilege.²⁴ The burden rests with the litigant proffering the expert evidence and is governed by the “preponderance of proof” standard.²⁵ However, differences of opinion are

19. See *United States v. O’Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008).

20. See *Daubert*, 509 U.S. at 597 (majority opinion) (“We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.”).

21. *Id.* at 590 (emphasis added).

22. See *Gen. Electric Co. v. Joiner*, 522 U.S. 136 (1997) (appellate courts reviewing a *Daubert* determination must apply an abuse of discretion standard).

23. See, e.g., *Moore v. Publicis Groupe*, 287 F.R.D. 182, 189 (S.D.N.Y. 2012), *adopted sub nom.* *Moore v. Publicis Groupe SA*, No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012) (holding Rule 702 inapplicable to discovery challenges).

24. See *Daubert*, 509 U.S. at 592–93 (“Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” (footnote omitted)).

25. See *id.* at 592 & n.10 (quoting FED. R. EVID. 104(a)); *Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987).

emerging over whether the application of Rules 104 and 702 to TAR is appropriate given that the gatekeeping analysis traditionally has arisen during the in limine phase prior to trial and not as a matter of discovery.²⁶ Notably, the Supreme Court has “use[d] the term in a broad sense to refer to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.”²⁷

In *Beech Aircraft Corp. v. Rainey*,²⁸ the Supreme Court noted that

Rules 702–705 permit experts to testify in the form of an opinion, and without any exclusion of opinions on “ultimate issues.” And Rule 701 permits even a lay witness to testify in the form of opinions or inferences drawn from her observations when testimony in that form will be helpful to the trier of fact.²⁹

In its gatekeeping analysis, a court must consider whether the expert will “assist the trier of fact,”³⁰ which is an issue to be determined by the trial judge.³¹ The trial court must then find that the expert testimony is “relevant to the task at hand” and that it rests “on a reliable foundation.”³² However, conclusions drawn from scientific knowledge must be based on legitimately sound scientific methodology, and not a test or standard of general acceptance.³³

Taking the above into consideration, Rule 702 sets forth the following factors concerning the admissibility of expert witness testimony:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized

26. Compare *Moore*, 287 F.R.D. at 188–89 (noting that Rule 702 concerns the admissibility of evidence at trial and finding that “Rule 702 and *Daubert* simply are not applicable to how [electronic] documents are searched for and found in discovery”), with *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331, 333 (D.D.C. 2008) (“[D]etermining whether a particular search methodology, such as keywords, will or will not be effective certainly requires knowledge beyond the ken of a lay person (and a lay lawyer) and requires expert testimony that meets the requirements of Rule 702 of the Federal Rules of Evidence.”).

27. See *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984) (referencing the definition of “in limine” as “[o]n or at the threshold; at the very beginning; preliminarily” (quoting BLACK’S LAW DICTIONARY 708 (5th ed. 1979))).

28. 488 U.S. 153 (1988).

29. *Id.* at 169.

30. FED. R. EVID. 702; *supra* note 24; see also 29 WRIGHT & GOLD, *supra* note 6, § 6266, at 263 & n.1 (citing *Daubert*, 509 U.S. at 595–96, for the proposition that questions related to an expert’s credibility are matters for the jury).

31. See FED. R. EVID. 104(a).

32. *Daubert*, 509 U.S. at 597.

“Relevant evidence” is defined as that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The Rule’s basic standard of relevance thus is a liberal one.

Id. at 587 (quoting FED. R. EVID. 401).

33. See *id.* at 589–93; see also *id.* at 588 (“The drafting history makes no mention of *Frye*, and a rigid ‘general acceptance’ requirement would be at odds with the ‘liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to ‘opinion’ testimony.” (quoting *Beech Aircraft*, 488 U.S. at 169)).

knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.³⁴

When Rule 702 was originally enacted in 1975, its application to eDiscovery review methodologies, understandably, was not contemplated.³⁵ However, there are numerous instances in litigation where the reliability of the discovery process can sculpt the direction of evidence in a case.³⁶ The review process applied to large volumes of ESI potentially could impact findings on dispositive motion practice as well as at trial.³⁷ Therefore, an eDiscovery review methodology arguably can impact a litigant's access to the most reliable evidence supporting a given claim or defense.³⁸

Therefore, the following observation of the Advisory Committee Notes may also be applied to search, retrieval, and review analysis of eDiscovery if the process is relevant to the evidence borne from it at trial: "An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it."³⁹

As the forms of ESI become more varied and pervasive, so do the discovery disputes attendant to them. The traditional procedural paradigm for pretrial discovery has evolved since the rules governing ESI took effect in 2006.⁴⁰ However, although the rules of procedure have evolved, there is no mechanism to challenge the methodology to ensure quality assurance of the review process. This places parties between the rocks and the whirlpool when the review process of electronically stored information could adversely impact the evidence ultimately presented at trial because it may be viewed as a discovery issue rather than an evidentiary question.⁴¹

34. See FED. R. EVID. 702.

35. See Federal Rules of Evidence, 93 Pub. L. No. 93-595, 88 Stat. 1926 (1975).

36. See *Symposium on the Challenges of Electronic Evidence*, *supra* note 4, at 1237.

37. See *id.*

38. See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260 n.10 (D. Md. 2008) ("[C]hallenges to the sufficiency of keyword search methodology unavoidably involve scientific [and] technical . . . subjects . . ."); *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331, 333 (D.D.C. 2008).

39. FED. R. EVID. 702 advisory committee's note.

40. See FED. R. CIV. P. 26 advisory committee's note ("When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.").

41. See *Symposium on the Challenges of Electronic Evidence*, *supra* note 4, at 1238.

II. AS BIG DATA GETS BIGGER, PRETRIAL RULINGS
ON EDISCOVERY REVIEW WILL UNDOUBTEDLY IMPACT
THE INTEGRITY OF TRIAL EVIDENCE

Practice Point 7 from the Sedona Conference's Best Practices Commentary on search and information retrieval provides that "[p]arties should expect that their choice of search methodology will need to be explained, either formally or informally, in subsequent legal contexts (including in depositions, evidentiary proceedings, and trials)."⁴²

Today's bench and bar must recognize the reality that the evolution of large-scale eDiscovery has created a tectonic shift in the topography of modern complex litigation. Federal Rule of Evidence 502 is a perfect example of how large-volume eDiscovery has earned a designation of exclusivity, in terms of the collateral risks associated with production and privilege review.⁴³ The evolution of Rule 502 arguably demonstrates an overarching theme that the gap between the discovery and trial phases is narrowing as the volume of ESI review increases. Arguably, the timing of when Rule 702 should be applied to review methodology should not differ from the timing of when a Rule 502 motion may be raised. Even if Rule 702 is considered a "trial" rule—and not a "discovery" rule—no specific reason could arguably surface from a court not to address a preliminary question prior to trial on the evidentiary impact ESI review methodology may have if challenged.⁴⁴ If the resulting discovery is subsequently offered as evidence at trial, the process by which the ESI was discovered may raise the issue of witness qualification and, therefore, whether the evidence derived from the review is admissible. Moreover, review methodology may raise questions of statutory privilege, which must be ruled upon by the court prior to reaching the fact-finder.⁴⁵ Federal Rule of Evidence 502 enables a federal court to enter an order allowing a litigant to prospectively assert a privilege,⁴⁶ rescind an inadvertent waiver resulting from production of discovery ("claw back"), and/or grant an opposing party limited access to a universe of discovery without relinquishing the ability to revoke it ("quick

42. See *Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 212 (2007) [hereinafter *Sedona Conference Best Practices*].

43. See FED. R. EVID. 502.

44. See *Renaud v. Martin Marietta Corp., Inc.*, 972 F.2d 304, 308 (10th Cir. 1992) ("In accordance with our holding in *Head v. Lithonia Corp., Inc.*, 881 F.2d 941 (10th Cir. 1989), the District Court had an independent duty here to decide whether the single data point supported the admissibility of the conclusions plaintiffs' experts sought to draw therefrom. In so doing, the Court was required by [Rule 104(a)] to make a preliminary determination concerning the qualifications of the plaintiffs' proposed witnesses and the admissibility of their testimony. This requirement applies also to experts, since pursuant to [Rule 703], the District Court has the responsibility of evaluating the trustworthiness of the factual basis upon which an expert witness relies and assessing 'whether the particular underlying data was of a kind that is reasonably relied on by experts in the particular field in reaching conclusions . . .'" (quoting WEINSTEIN'S EVIDENCE ¶ 703[03], at 703-16 (1982))).

45. See FED. R. EVID. 104(a).

46. See *id.* 502(d) advisory committee's note ("Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery.").

peek”).⁴⁷ Similar to Rule 502, the language of Rule 702 does not relegate a court to the “trial” phase prior to addressing questions of prospective admissibility of evidence.⁴⁸

As indicated in the aforementioned comparison to the timing of a court’s application of Rules 502 and 702, an argument against applying *Daubert*’s gatekeeping function to search and review methodologies, like TAR (e.g., predictive coding), is premised on the concept that Rule 702 applies to trial evidence and *not pretrial discovery*.⁴⁹ However, pretrial rulings in cases such as *In re Actos (Pioglitazone) Products Liability Litigation*⁵⁰ and *Global Aerospace Inc. v. Landow Aviation, L.P.*⁵¹ address predictive coding and how statistical analytical disciplines are applied to discovery review.⁵²

If parties are unable to seek judicial intervention at the onset of a high-risk discovery dispute, then litigants must risk proceeding with a review process that may ultimately frustrate the goal of “secur[ing] the just, speedy, and inexpensive determination of every action and proceeding.”⁵³

Federal Rule of Evidence 502 empowers a court to prospectively protect against waiver of privilege, and therefore, one can argue that the spirit of the rule and its application to the discovery phase is inapposite to a *Daubert* application to TAR under Rule 702. However, Rule 502 is a vehicle to enter an evidentiary order that impacts the manner in which privilege will be protected during the discovery phase of litigation—a process in which a court is able to partake during the discovery phase under Rule 502(d). Rule 502 exemplifies the system’s recognition of the inextricable tie between the discovery phase of litigation and the domino effect that discovery rulings can have on future proceedings.⁵⁴

III. THE DEBATE OVER WHETHER RULE 702 SHOULD APPLY TO LITIGATING EDISCOVERY METHODOLOGIES

The evolving debate over whether Rule 702 should apply to litigation relating to eDiscovery search and review methodologies (e.g., TAR, keyword searching, etc.) supports the argument that the admissibility of ESI

47. See *id.* (“[T]he rule contemplates enforcement of ‘claw-back’ and ‘quick peek’ arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product.”); see also MANUAL FOR COMPLEX LITIGATION § 11.446 (4th ed. 2004) (noting that fear of the consequences of waiver “may add cost and delay to the discovery process for all parties” and that courts have responded by encouraging counsel “to stipulate at the outset of discovery to a ‘nonwaiver’ agreement, which they can adopt as a case-management order.”).

48. See FED. R. EVID. 702.

49. See *Moore v. Publicis Groupe*, 287 F.R.D. 182, 190–92 (S.D.N.Y. 2012), *adopted sub nom.* *Moore v. Publicis Groupe SA*, No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).

50. No. 6:11-md-2299, 2012 WL 7861249 (W.D. La. July 27, 2012).

51. No. CL 61040, 2012 WL 1431215 (Va. Cir. Ct. Apr. 23, 2012).

52. See *Symposium on the Challenges of Electronic Evidence*, *supra* note 4, at 1237; see also *In re Actos*, 2012 WL 7861249, at *4.

53. See FED. R. CIV. P. 1.

54. See *Symposium on the Challenges of Electronic Evidence*, *supra* note 4, at 1240.

is far more dependent on the underlying integrity of the pretrial discovery phase than other forms of more “traditional” evidence.⁵⁵

Today’s complex litigation presents an inextricable link between eDiscovery and the underlying integrity of the evidence presented at trial.⁵⁶ Litigation over TAR and related eDiscovery search and review methodologies should be subject to Rule 702 and the common law “gatekeeping” analysis.⁵⁷ Notably, Federal Rule of Evidence 102 states “[t]hese rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”⁵⁸

The types and volume of ESI differ across litigations—both civil and criminal—and in many instances, the stakes for litigants are too high not to qualify the certain eDiscovery review methodologies consistent with Rule 702. This is particularly the case to ensure the discovery at issue is representative of the anticipated trial evidence.⁵⁹

In *Victor Stanley, Inc. v. Creative Pipe, Inc.*,⁶⁰ the court stated that “the party selecting the methodology must be prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task, and show that it was properly implemented.”⁶¹ In *Equity Analytics, LLC v. Lundin*,⁶² the court held that determining whether particular search methodologies, such as keywords, “will or will not be effective certainly requires knowledge beyond the ken of a lay person (and a lay lawyer) and requires expert testimony that meets the requirements of Rule 702 of the Federal Rules of Evidence.”⁶³

As *Moore* illustrates, the gatekeeping function delineated in *Daubert* is not operative unless the fact-finder will be presented with a question regarding evidentiary admissibility.⁶⁴ As a practical matter, however, this

55. See *supra* note 38.

56. See *United States v. O’Keefe*, 537 F. Supp. 2d 14 (D.D.C. 2008); see also *Symposium on the Challenges of Electronic Evidence*, *supra* note 4, at 1236.

57. See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260–61 n.10 (D. Md. 2008) (“The goal of Federal Rule of Evidence 702 is to set standards to determine whether information is ‘helpful’ to those who must make factual determinations involving disputed areas of science, technology or other specialized information. The rule is one of common sense, and reason-opinions regarding specialized, scientific or technical matters are not ‘helpful’ unless someone with proper qualifications and adequate supporting facts provided such an opinion after following reliable methodology. That these common sense criteria are found in the rules of evidence does not render them off-limits for consideration during discovery. It is not unusual for pretrial factual determinations in civil cases to look to the Federal Rules of Evidence for assistance in resolving fact disputes.”).

58. FED. R. EVID. 102.

59. See *O’Keefe*, 537 F. Supp. 2d at 24 (“[C]ontention must be based on evidence that meets the requirements of Rule 702 of the Federal Rules of Evidence.”).

60. 250 F.R.D. 251 (D. Md. 2008).

61. *Id.* at 262.

62. 248 F.R.D. 331 (D.D.C. 2008).

63. *Id.* at 333.

64. See *Moore v. Publicis Groupe*, 287 F.R.D. 182, 188–89 (S.D.N.Y. 2012), *adopted sub nom.* *Moore v. Publicis Groupe SA*, No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).

approach is problematic. Understandably, when the rules of court were initially promulgated, they did not contemplate the influence pretrial discovery rulings could have on the evidence ultimately presented at trial. If technological concepts like TAR may require expert testimony, no present rule procedural mechanism available under the rules pertaining to discovery is available to challenge the validity of a disputed review process.

If *Daubert* and Rule 702 are not at a court's disposal at the discovery phase, the equitable hands of the judicial process become tied by relegating the "reliability" test to trial. Litigants should not be required to remain silent during the review phase of eDiscovery if a legitimate challenge to the process concerns the underlying integrity of the evidence that will ultimately reach the jury (or trial judge). Large data discovery review has only increased the need for the court to invoke—when moved—its gatekeeping function earlier in the litigation process. Failing to do so could result in a misunderstanding by the fact finder of the evidentiary significance of the information derived from the eDiscovery review process. Restricting Rule 702 for addressing eDiscovery review on an in limine basis could confuse the issues to be adjudicated at a late stage of litigation. Waiting until trial before utilizing Rule 702 to address whether the results of a review process are technologically—or scientifically—reliable arguably places the evidentiary integrity underlying the fact-finding process at risk.⁶⁵

The judicial process accepts the use of TAR because it can be more cost effective than manual review, and if handled properly, can be a more reliable alternative to manual review. Ironically, one can only endorse TAR as a reliable mechanism for large volume discovery review once determining that the results are statistically significant, a process which must adhere to scientifically reliable processes.⁶⁶ No matter how one perceives the role of the gatekeeping function, it is apparent that it is being invoked—however subtly—when ESI review is otherwise impractical without it.⁶⁷

However, TAR, if not implemented and tested properly, risks false and/or incomplete results that could compromise a litigant's claims or defenses at trial. The manner in which eDiscovery is handled can impact a variety of matters: The patterns or quantity of particular types of relevant documents produced; a litigant's ability to support or impeach a claim of patterned conduct; and direct or circumstantial evidence of intent, negligence, and other claims where knowledge, notice, and chain of custody are at the heart

65. Challenges to expert evidence are not merely issues of evidentiary weight for the jury to determine. A litigant, therefore, may challenge the application of a process that yields certain results, which bear on the integrity of the evidence before the fact finder. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585 (1993).

66. *See supra* notes 38, 59.

67. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (noting that gatekeeping function espoused in *Daubert* may be applied to all expert testimony, including scientific and nonscientific evidence).

of the dispute.⁶⁸ Courts must analyze eDiscovery review methodologies to ensure the integrity of the discovery process for the underlying litigation.

CONCLUSION

As technology continues to advance, so will eDiscovery jurisprudence. The “gatekeeping” function mandated by the Supreme Court should no longer be relegated to *Daubert* challenges on the eve of trial. As the “gatekeepers” of expert testimony,⁶⁹ courts should analyze eDiscovery review methodologies—even during the discovery phase of litigation—to the extent that they will impact the validity of evidence at trial.

Federal Rule of Evidence 102 states: “These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”⁷⁰

The stakes for litigants are too high for a finding not to be made by a court on the reliability of the technology at the heart of an eDiscovery dispute. An analysis of the verification of the standard operating procedures used and technological modules calls for a “gatekeeping” function. TAR—and other related issues subject to many eDiscovery challenges—if not properly analyzed, risks false and/or incomplete results that very well may compromise a litigant’s claims or defense at trial. Although eDiscovery review is pretrial, the “gatekeeping” function incumbent upon the judicial system to ensure a full and fair presentation of the best—and, most importantly, accurate—evidence transcends all phases of the litigation process.

68. See *Global Aerospace Inc. v. Landow Aviation, L.P.*, No. CL 61040, 2012 WL 1431215 (Va. Cir. Ct. Apr. 23, 2012) (“Order Approving the Use of Predictive Coding for Discovery”).

69. See *Kumho Tire Co.*, 526 U.S. at 147 (explaining that Rule 702 makes “no relevant distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge” and “makes clear that any such knowledge might become the subject of expert testimony”).

70. FED. R. EVID. 102.